

Hon. C. Steven McMurry, Chair  
Committee on Improving Small Claims Case Processing  
1501 W. Washington St., Ste. 410  
Phoenix, AZ 85007

IN THE SUPREME COURT

STATE OF ARIZONA

|                            |   |                             |
|----------------------------|---|-----------------------------|
| PETITION TO ADOPT ARIZONA  | ) |                             |
| RULES OF SMALL CLAIMS      | ) |                             |
| PROCEDURE AND MODIFY       | ) | Supreme Court No. R-18-0021 |
| RULE 101(b) OF THE JUSTICE | ) |                             |
| COURT RULES OF CIVIL       | ) | Reply                       |
| PROCEDURE                  | ) |                             |
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Consistent with Rule 28 of the Rules of the Arizona Supreme Court and this Court's July 12, 2018 scheduling order, Petitioner hereby submits this Reply.

**I. Introduction**

This rule petition has had three comment periods since the filing of the initial petition on January 10, 2018. It is important to note that this Court authorized a concurrent pilot program of the proposed Arizona Rules of Small Claims Procedure filed with the initial petition ("pilot rules"). The purpose of multiple comment periods was to allow the Committee on Improving Small Claims Case Processing ("Committee") to reconvene, address issues raised by the comments, review pilot program data, and file an amended rule petition thereafter.

The first comment period ended on March 16, 2018 and produced three comments. The committee reconvened on April 18, 2018 to discuss the comments and recommended a number of modifications to its originally proposed Arizona Rules of Small Claims Procedure (“Rules”). An amended petition reflecting these changes was filed on April 27, 2018.

The second comment period ended on September 7, 2018 and produced two comments. The Committee reconvened on September 11, 2018 to discuss the comments and pilot program data and recommended a number of modifications to the proposed Rules. A second amended petition reflecting these changes was filed on September 19, 2018.

The third comment period ended on October 19, 2018 and produced six comments. Petitioner, on behalf of the Committee, files this Reply in response to the concerns raised by these comments.

Based on the ongoing pilot program and the Committee’s desire to collect data on recent revisions to the proposed Rules, a request to extend the pilot program and delay consideration of petition R-18-0021 will be filed separately. Nonetheless, the Committee deems it important to file this Reply to address the concerns reflected in the comments already filed.

## **II. Background**

To adequately reply to the comments, it is necessary to provide background and reiterate the rationale for the establishment of the Committee. The statutory purpose of the small claims process is to provide a forum for “the inexpensive, speedy and informal resolution of small claims.” Arizona Revised Statutes (ARS) § 22-501. However, the time standards data for Arizona’s small claims cases indicates that the small claims process in Arizona is anything but inexpensive, speedy and informal. In fact, the time standards data revealed a systemic breakdown that has perpetuated case processing delays throughout Arizona.

Specifically, although the small claims case processing standard adopted for Arizona requires courts to dispose of 75% of cases within 100 days, 90% of cases within 150 days, and 98% of cases within 180 days, nearly every justice court in Arizona falls well below these thresholds. See Appendix A. Accordingly, this Court, through Administrative Order 2016-115, established the Committee and charged it with making recommendations to address the ongoing and significant case processing delays in small claims cases.

The Committee’s preliminary work included an analysis to determine why small claims cases had such significant case processing delays. An analysis of 410 cases revealed delays for the following reasons:

- Delayed court dismissal for lack of service (41%)
  - Average case age = 755 days

- Case age range = 104 – 3,464 days
- Delayed or no application for entry of default (19%)
  - Average case age = 683 days
  - Case age range = 103 – 4,059 days
- Delayed or no motion for judgment after an application for entry of default was filed (6%)
  - Average case age = 633 days
  - Case age range = 102 – 3,241 days
- Delayed or no hearing set upon the filing of an answer (10%)
  - Average case age = 387 days
  - Case age range = 102 – 4,051 days

Based on this data, it is clear that: (1) small claims cases are “falling through the cracks” with regard to court case processing and monitoring, and (2) parts of the small claims process prove difficult for the average small claims litigant to navigate with regard to the process required to move the case to adjudication.<sup>1</sup> Moreover, the data indicates that even if litigants file all required documents, there is no way to ensure that the court will take the required action to move the case forward, such as setting a hearing when an answer is filed. The Committee used

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<sup>1</sup> The “average small claims litigant” used in this context does not include businesses, or “super filers,” that utilize the small claims process in many courts as a means of debt collection to obtain non-appealable judgments against defendants.

this data in crafting the proposed Rules to ensure they address the problems present in the current small claims process and ensure that the small claims process is inexpensive, speedy and informal as the Arizona Legislature intended.

### **III. Discussion of Predominant Concerns**

The comments posed three predominant concerns. First, the proposed Rules require that every small claims case be set for a hearing at the time of filing. Second, the proposed Rules eliminate the requirement for the defendant to file a written answer unless a counterclaim is filed, or the defendant is otherwise ordered by the court to file a written answer. Third, the proposed Rules will increase the costs and resources allocated to small claims case processing.

#### ***(a) Requirement to set the case for hearing at the time of filing***

The Committee has had extensive discussions regarding the most effective method for ensuring that cases are heard in a timely manner. Committee members agreed that apart from civil cases, the small claims case type is the only justice court case type that does not have a hearing date set at the time the complaint is filed. Despite the exploration of alternatives, the hearing provisions of the proposed Arizona Rules of Small Claims Procedure is the only procedure that will ensure small claims cases do not fall through the cracks.

Several comments from the Maricopa County Justice Courts, including both Maricopa County Justice Courts participating in the pilot program, have raised

concerns related to the resources that will be required if every small claims case is set for hearing at the time of filing. The Committee has responded to these concerns by modifying the proposed Rules to allow for case dismissal on the 61<sup>st</sup> day if proof of service has not been filed with the court, thereby allowing scheduled hearings to be vacated. This differs from the proposed rules that were initially piloted because the initial proposed rules did not allow for dismissal for lack of service. Specifically, under the initial pilot rules, every case went to hearing, even the cases that had not been served. This resulted in hearing officers and court staff engaging in the ministerial tasks of dismissing cases for lack of service when no parties appeared, deciding requests for extensions of service, and rescheduling hearings.

Under the revised proposed Rules, cases that have not had proof of service filed within 60 days can be dismissed and removed from the court's calendar. This results in a hearing calendar where each scheduled case will have proof of service on file. Significantly, pilot program data reflects that approximately 40% of cases filed will be disposed and thus removed from the courts' calendars through dismissals for lack of service and voluntary dismissals before the actual hearing date. This revision will reduce the number of cases on the court's calendar for a given day and ensure that the court is hearing only those cases in which service has been executed.

Additionally, the Committee revised the proposed Rules to extend the timeframe in which the court must set the hearing. Specifically, the initial pilot rules required that a hearing be set 45 to 60 days from the date of filing. Based on feedback from the pilot courts, the Committee revised the timeframe so that a hearing must be set 60 to 75 days from the date of filing. This provides a cushion of at least 30 to 45 days after proof of service has been filed to handle interim matters without the need to reschedule the hearing in every case. The Committee takes the position that this will allow litigants to have a meaningful court date, alleviating the need for litigants to take additional days off work.

Comments from Honorable Keith Russell, Presiding Judge of the Maricopa County Justice Courts, Mr. James Morrow, Maricopa County Justice Court Administrator, and Mr. Charles Adornetto, Maricopa County Justice Court Judicial Education Officer, have raised specific concerns regarding the resources that will be required for business entity filings, which make up 72% of Maricopa County's small claims case filings. Specifically, they have indicated that many business entities process their small claims cases in an efficient manner and cases generally result in a default judgment, stipulated judgment, or dismissal for inactivity, which would result in unnecessary hearings and wasted resources under the proposed Rules.

The Committee understands the concerns raised but takes the position that these cases can be managed through alternative calendaring management for business filers that is separate and apart from non-business filers. This type of calendar management would allow a business entity with multiple filings to appear on a particular day to have its filings heard. Additionally, the proposed Rules make provisions for settlement agreements to be filed prior to the hearing date and allow courts to dismiss cases for lack of service. These actions can take place before the hearing date, relieving the court of the need to hold a hearing.

Additionally, although many business entities are accustomed to the ability to obtain a default judgment without having a hearing, the Rules do not make a provision that would allow parties to engage in this practice. The rationale for this is partly due to the removal of the requirement for the filing of a written answer (discussed in the next section), but is largely a reflection of the Committee's sensitivity to the nature of small claims cases because the judgment is not appealable, and parties cannot be represented by counsel.

Moreover, the initial data reviewed indicates that the small claims process is not as intuitive to the average small claims litigant as it may be to those who handle or file small claim cases on a regular basis. The data reflects that the default process can become confusing to litigants and result in the abandonment of the case. As such, the Committee opines that removing the requirement to file



default paperwork increases access and simplifies the process for small claims litigants because the plaintiff merely has to serve the defendant, appear at the scheduled hearing, and present their case to the court.

The Committee recognizes that this may create an imposition for business entities that are accustomed to being able to obtain non-appealable judgments without ever having to appear in court and present their case to a judge or hearing officer, but the Committee believes that any filer, business or non-business, should be required to appear and support why entry of a non-appealable judgment is warranted in a given case. This allows a process that is fair to “professional filers” who are familiar with the small claims process, as well as the average small claims litigant who may not be as familiar with the process.

Lastly, concerns were raised in the comment from several members of the Maricopa County Justice Court Bench related to the statutory scheme of ARS § 22-515.<sup>2</sup> The Committee interprets this statute differently than the commenters. Specifically, the Committee does not interpret the statute to mean that the filing of an answer is the *only* time in which the court may set the case for hearing; the statute merely delineates one instance that will trigger the court to set a hearing. Accordingly, the Committee contends that setting the hearing at the time of filing is permissible under the current statutory scheme.

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<sup>2</sup> “On the filing of an answer by the defendant, the clerk shall set the answer for hearing.” ARS § 22-515.

The Committee acknowledges that the requirement to set a hearing at the time of filing in a small claims case is a significant departure from the current process. It is important to note that scheduling a hearing at the time of filing in small claims cases is not a concept that was newly developed by this Committee. The Committee's preliminary work revealed that many jurisdictions with much higher small claims case volumes, including the LA County courts and Utah courts, utilize this approach and have had a great deal of success. The current process in Arizona is not working, and significant changes must be made in order to restore the small claims process in Arizona.

***(b) Elimination of the requirement to file an answer***

Comments from the Honorable Adam Watters, Presiding Judge of the Pima County Consolidated Justice Court, several members of the Maricopa County Justice Court Bench, and Mr. James Morrow have raised concerns related to the elimination of the requirement to file an answer.

The Committee had several discussions related to whether a written answer is fundamental to the small claims process. The Committee takes the position that the small claims answer generally provides little or no information regarding legal defenses that may be raised, rendering a written answer of little or no use to the plaintiff.

Comments have raised concerns about due process and ensuring that the plaintiff is not “ambushed” at the hearing. The Committee agrees that its intent was not to allow an ambush and modified the proposed Rules to allow the court to order the defendant to file a written answer and continue the hearing if it opines that the plaintiff is at a disadvantage at the hearing.

The proposed Rules do not prohibit the filing of a written answer—the proposed Rules make the filing of a written answer optional. This allows defendants who may not have the ability to read or write to appear in court to respond to the lawsuit filed against them. Mr. Morrow’s comment indicates that there may be a loss of revenue due to the decrease in filing fees collected for small claims answers. While the Committee acknowledges that this may be true, it believes that improving Arizona’s small claims process and increasing access to justice should not hinge on a projected loss of filing fee revenues.

Additionally, concerns were raised in the comment from several members of the Maricopa County Justice Court Bench related to the statutory scheme of ARS § 22-514.<sup>3</sup> The Committee interprets this statute differently than the commenters. Specifically, the Committee interprets this statute as prescribing a timeframe to file an answer, which must be placed on the summons, but not as prescribing a

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<sup>3</sup> “The time in which the summons shall require defendant to answer is in all cases twenty days, commencing from the date of service.” ARS § 22-514.

requirement to file an answer. The proposed Rules have been drafted to allow a 20-day timeframe for the defendant to file a written answer if they choose to do so.

Lastly, the Committee feels that it is important to note that removing the requirement for a written answer in small claims cases is not a concept that was newly developed by this Committee. Specifically, much of the Committee's preliminary work included looking to the small claim processes utilized by other states throughout the nation. The Committee discovered that in almost half the nation (23 states), a written answer is not required from the defendant in a small claims case. Similar to the 23 states that do not require a written answer from the defendant, the Committee takes the position that the requirement to file a written answer in small claims cases in Arizona is not fundamental to the process.

***(c) Costs and resources***

Comments from Judge Russell, several other members of the Maricopa County Justice Court Bench, and Mr. Morrow have raised concerns related to the increase in costs and resources that courts will have to allocate to small claims case processing.

The Committee agrees and acknowledges that under the initial pilot rules, additional resources were required in order to hold a hearing in every case. In response, the Committee has made revisions to the proposed Rules to address these concerns. Additionally, the Committee supports extending the pilot program to

determine the impact that these revisions will have on the costs referenced in the comments.

As to the costs associated with business entities or “super filers” having to appear in every case, the Committee reiterates its position that any filer, business or non-business, should be required to appear and support why entry of a non-appealable judgment is warranted in a given case. Nonetheless, administrative approaches can be utilized in courts that will allow businesses to maximize their time, such as calendaring all cases for a given filer on a particular day. Ultimately, the Committee must consider procedural fairness and due process for all citizens of Arizona, and the Committee believes that there are alternatives that can be implemented on a local level that will minimize the costs that these entities may potentially incur.

*(d) Other concerns presented*

A comment from Ms. Ellen Katz, filed on behalf of Community Legal Services, DNA People’s Legal Services, Southern Arizona Legal Aid, and the William E. Morrison Institute for Justice raised concerns related to the timeframe for the hearing date, service, and pleading requirements. For the reasons stated in section a, the Committee believes that the timeframe in which a hearing is required under the proposed Rules is adequate. Additionally, pilot program data reflects that the average time to execute service in the Manistee and Hassayampa Justice

Courts was 10 and 12 days, respectively. In the Casa Grande and Maricopa-Stanfield Justice Courts, the average time to *file* proof of service was 20 and 32 days, respectively. Accordingly, the Committee takes the position that 30 days to file proof of service is adequate and that a longer timeframe would unnecessarily prolong every case. Moreover, because pilot program data reflects that requests for extensions for time to serve are limited, even defendants served near the 30-day mark will have 30 to 45 days to prepare. Lastly, extensive preparation or the ability to file motions or request subpoenas are rarely needed in these cases. However, the ability to continue remains.

Lastly, while the Committee acknowledges that motions to change venue, requests to reschedule the court date, requests to appear telephonically, and requests that a justice of the peace hear the case rather than a hearing officer are all potential filings for small claims cases, these pleadings are very infrequent. The Committee believes that the proposed Rules establish a safeguard by allowing the defendant to request additional time to prepare. Moreover, the Committee puts a great deal of weight in the capability of justices of the peace and hearing officers to ensure that the defendant's timeline for filing any subsequent pleadings is not impeded if extensions are granted.

Ms. Katz also raised a concern that the proposed Rules do not allow amended complaints or counterclaims. The Committee discussed this topic at

length. The Committee takes the position that in an effort to keep small claims simple, efficient, and speedy, amended complaints or amended counterclaims should not be permitted.

Ms. Katz commented on the lack of explicit language in the proposed Rules to allow parties to object to documentary and witness evidence at the hearing. The proposed Rules remain silent on this. The Committee reiterates the need to keep the small claims process and proposed Rules simple and not overcomplicated.

Ms. Katz raised concerns regarding the timeframe set forth in proposed Rule 16 regarding requests for reasonable accommodations. The Committee discussed the language of this proposed Rule at its September 11, 2018 meeting. The Committee discussed changing the timeframe to “as soon as possible,” but Committee members agreed that a solid deadline keeps the process streamlined so that court staff can make the appropriate arrangements, which avoids having to reschedule hearings. The Committee Chair emphasized that the proposed Rule makes use of the word “should,” and that judges and hearing officers are adequately trained to ensure that decisions rendered are compliant with Title VI.

Ms. Katz raised concerns related to party contact information being provided to the court so that the court can communicate with the parties when necessary. Specifically, the proposed Rules do not provide a method by which parties can keep their information confidential by allowing alternative methods and formats by

which the information can be provided to the court. Since the proposed Rules do not indicate a specific format or method for providing this information to the court, it is the Committee's position that courts can implement local procedures for this safeguard, without a need to modify the language of the proposed Rules. This information will be made available in informational material that will be developed for litigants. Judicial officers and court staff will be trained in this area.

Ms. Ellen Katz commented that the proposed Rules lack instructions for the issuance of a subpoena. It is the Committee's position that this should be addressed through instructional materials for litigants and not through the proposed Rules.

Ms. Katz commented that the font size on the Notice to the Plaintiff and Defendant is too small. The font size is the result of the Committee's attempt to keep this a one-page document. The Committee believes that the information provided on this document is important to both parties and should not exceed one page in length.

Ms. Katz also commented that language should be added to the Notice to the Plaintiff and Defendant to indicate that the defendant **MUST** transfer the case to the civil division to preserve the rights listed on the notice, such as the right to appeal, the right to an attorney, etc. The Committee discussed this comment at its September 11, 2018 meeting. The Committee agreed that this borders on legal



advice and should not be put in the proposed Rules. The committee agreed that similar language may be more appropriate in educational materials for litigants.

Ms. Katz and several other commenters raised concerns regarding the proposed Rule 21 exception for consolidated justice courts. The Committee seeks to support justice courts with unique structures that result in small claims case volumes that are more than three times higher than any other justice court in Arizona.

Lastly, a comment from the Honorable Frank Conti suggests that the small claims process should mimic the civil litigation paradigm. The Committee takes the position that this paradigm is the reason that small claims cases in Arizona are languishing. Additionally, to have a small claims process that mimics the civil litigation paradigm defeats the legislature's purpose for creating a small claims division in the justice courts. The legislature's intent was to create a forum for the speedy resolution of cases as opposed to mimicking a process that is intended for more complex cases.

#### **IV. Conclusion**

The Committee appreciates the comments stakeholders submitted during the comment periods, which have allowed the Committee to improve its work product. The Committee deems it important to file this Reply to address the concerns reflected in the comments, but as referenced throughout this Reply, the Committee

seeks to extend the pilot program to further evaluate the impact of the revisions to the proposed Rules.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of October, 2018

By /s/ C. Steven McMurry  
Hon. C. Steven McMurry, Chair  
Committee on Improving Small Claims Case  
Processing  
1501 W. Washington Street, Ste. 410  
Phoenix, AZ 85007  
602-452-3966  
mmathes@courts.az.gov

## Appendix A

### SMALL CLAIMS

75% WITHIN 100 DAYS - 90% WITHIN 150 DAYS - 98% WITHIN 180 DAYS

# DRAFT

